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Public Prosecutor v Oktavius Jerrick Pui

B HIGH COURT (KUCHING) — CRIMINAL TRIAL NO KCH-45A-4/11 OF 2014
ALWI ABDUL WAHAB JC
20 OCTOBER 2016

C *Criminal Law — Dangerous drugs — Trafficking — Accused charged with offence of trafficking in methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the same Act — Whether accused had drug in his possession — Whether drug was methamphetamine and listed in First Schedule of the DDA — Whether accused* D *did traffic drug — Whether prima facie case proven — Whether case proven beyond reasonable doubt — Dangerous Drugs Act 1952 s 39B(1)(a) & (2)*

E The accused was charged with the offence of trafficking in dangerous drugs, methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the same Act. The prosecution's case was based on the evidence of the custom officers (PW2, PW3, PW4, PW5 and PW11), the investigating officer ('PW14') and the chemist ('PW6'). From the evidence of the customs officers, the accused was seen pushing a trolley with F two luggage bags ('exhs P5 and P6') and when checked, it was discovered that exhs P5 and P6 contained women shoes. Upon further checking of the shoes, the custom officers discovered brown tape package inside the sole of the shoes which contained crystalline substances which later confirmed by PW6 as 4315.67g of methamphetamine. In defence, the accused contended that he G was asked to carry exhs P5 and P6 by his wife's friends ie a couple known as Frankie and Sani when he attended their wedding in India. He therefore argued that he had no knowledge of the contents of the luggage bags and was an innocent carrier. The essential ingredients of the offence for court's determination were: (a) whether the accused had the drug in his possession; (b) H whether the drug was methamphetamine and listed in the First Schedule of the DDA and weighed 4315.67g; and (c) whether the accused did traffic the drug.

Held, convicting the accused of the offence and sentencing him to death:

I (1) By having exhs P5 and P6 with him, carrying it and putting it on the scanner machine, the accused had taken physical custody and control of it and its contents. The accused's knowledge of the contents of exhs P5 and P6 could be inferred from the facts and the circumstances of the case whereby the drugs were carefully concealed inside the sole of women shoes which may indicate the intention to avoid detection by the

authority and thereby point to the accused's knowledge. Based on the circumstances, the prosecution had sufficiently proved that the accused was in possession of exhs P5 and P6 and the drugs which were contained in it (see paras 17, 21 & 23).

(2) Despite the difference in weight of crystalline substance in PW6's chemist report ('exh P24') and his witness statement ('WSPW6'), the net weight of the methamphetamine was the same for both the exhibits which was 4,315.67g. There could not be any mistaken identity of the drugs analysed by PW6. Further, from the evidence, the court was satisfied that the prosecution had sufficiently proved the required standard that the crystalline substances contained a total of 4315.67g of methamphetamine. PW6 also had stated in exh P24 that methamphetamine was a drug listed in the First Schedule of the DDA. Thus, the prosecution had proved the second ingredient of the offence (see paras 27–28 & 30).

(3) It had been proven that the net weight of methamphetamine found inside exhs P5 and P6 that were carried by the accused was 4315.67g, which was in great excess than the threshold set at 50g, hence, the accused must be presumed to be trafficking under s 37(da)(xvi) of the DDA. The third ingredient of the offence was therefore proven (see para 33).

(4) The prosecution had also proven to the court that the act of the accused in carrying exhs P5 and P6 from India to Kuala Lumpur then Kuching fell within the meaning of 'trafficking' under s 2 of the DDA. Based on the above finding, prima facie case had been made out (see paras 34 & 49).

(5) The last minute request to carry exh P5 which contained a multiple number of women shoes and the other few women shoes which were put by Sani in exh P6 on their way to the airport should have raised some suspicions in the accused's mind that he ought to have checked its contents. Further, there was no plausible explanation given as to why exh P5 was securely locked with a padlock and the key was kept by the accused. Once control and custody had been established and in the absence of any plausible explanation, it was a fair inference that the accused had knowledge of the drug found in the sole of women shoes inside exhs P5 and P6. In totality, the defence had failed to cast any reasonable doubt on the prosecution's case, hence, the prosecution had proven its case beyond reasonable doubt (see paras 55 & 69–70).

[Bahasa Malaysia summary

Tertuduh dituduh dengan kesalahan mengedar dadah berbahaya, methamphetamine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') boleh dihukum di bawah s 39B(2) Akta yang sama. Kes pendakwaan adalah berdasarkan keterangan pegawai kastam (PW2, PW3, PW4, PW5 dan PW11),

dan pegawai penyiasat ('PW14') dan ahli kimia ('PW6'). Daripada keterangan pegawai kastam, tertuduh dilihat menolak troli dengan dua beg bagasi ('ekshs P5 dan P6') dan apabila diperiksa, ia mendapati bahawa ekshs P5 dan P6 mengandungi kasut wanita. Setelah pemeriksaan lanjut kasut tersebut, pegawai kastam mendapati pakej pita coklat di dalam telapak kasut yang mengandungi bahan kristal yang kemudiannya disahkan oleh PW6 sebagai 4315.67g methamphetamine. Dalam pembelaan, tertuduh menghujahkan bahawa dia telah disuruh untuk membawa ekshs P5 dan P6 oleh kawan isterinya iaitu pasangan Frankie and Sani apabila dia menghadiri perkahwinan mereka di India. Dia oleh itu menghujahkan bahawa dia tidak mempunyai pengetahuan kandungan beg bagasi dan adalah pembawa tidak bersalah. Unsur penting dalam kesalahan untuk ditentukan oleh mahkamah adalah (a): sama ada tertuduh mempunyai dadah dalam milikannya; (b) sama ada dadah adalah methamphetamine dan tersenarai dalam Jadual Pertama ADB dan mempunyai berat sebanyak 4315.67g, dan (c) sama ada tertuduh telah mengedar dadah.

Diputuskan, menyabitkan tertuduh dengan hukuman dan menjatuhkan hukuman mati atasnya:

(1) Dengan mempunyai ekshs P5 dan P6 bersamanya, membawanya dan meletakkannya di mesin pengimbas, tertuduh telah mengambil jagaan fizikal dan kawal terhadapnya serta kandungannya. Pengetahuan tertuduh terhadap ekshs P5 dan P6 boleh disimpulkan daripada fakta dan keadaan kes yang mana dadah telah disembunyikan dengan berhati-hati di dalam tapak kasut perempuan yang boleh menunjukkan niat untuk mengelak pengesanan oleh pihak berkuasa dan dengan itu menunjukkan pengetahuan tertuduh (lihat perenggan 17, 21 & 23).

(2) Walaupun perbezaan dalam berat bahan kristal dalam laporan ahli kimia PW6 ('eksh P24') dan kenyataan saksinya (WSPW6), berat bersih methamphetamine adalah sama untuk kedua-dua ekshibit iaitu 4,315.67g. Tidak terdapat apa-apa salah identiti dadah yang dianalisis oleh PW6. Selanjutnya, daripada keterangan, mahkamah berpuas hati bahawa pendakwaan telah dengan secukupnya membuktikan standard yang dikehendaki bahawa bahan Kristal mengandungi sejumlah 4,315.67g methamphetamine. PW6 juga menyatakan dalam eksh P24 bahawa methamphetamine adalah dadah tersenarai dalam Jadual Pertama ADB. Maka, pendakwaan telah membuktikan unsur kedua kesalahan (lihat perenggan 27–28 & 30).

(3) Ia telah dibuktikan bahawa berat bersih methamphetamine dijumpai dalam ekshs P5 dan P6 yang dibawa oleh tertuduh adalah 4,315.67g, yang mana melampaui daripada ambang yang ditetapkan pada 50g, oleh itu, tertuduh mestilah dianggap mengedar di bawah s 37(da)(xvi) ADB. Unsur ketiga kesalahan oleh itu telah dibuktikan (lihat perenggan 33).

(4) Pendakwaan juga telah membuktikan kepada mahkamah bahawa tindakan tertuduh yang membawa ekshs P5 dan P6 dari India ke Kuala Lumpur terangkum dalam maksud 'trafficking' di bawah s 2 ADB. Berdasarkan dapatan di atas, kes prima facie telah dibuat (lihat perenggan 34 & 49).

(5) Permintaan di saat akhir untuk membawa eksh P5 yang mengandungi pelbagai kasut perempuan dan beberapa kasut perempuan yang mana diletakkan oleh Sani di dalam eksh P6 sewaktu perjalanan mereka ke lapangan terbang sepatutnya telah membangkitkan sedikit syak dalam fikiran perayu bahawa dia sepatutnya memeriksa kandungannya. Selajutnya, tiada penjelasan munasabah diberikan mengapa eksh P5 telah dikunci dengan selamat dengan mangga dan kuncinya disimpan oleh tertuduh. Apabila kawalan dan jagaan telah dibuktikan dan tanpa kehadiean apa-apa penjelasan munasabah, ia adalah inferens yang adil bahawa tertuduh mempunyai pengetahuan terhadap dadah yang didapati dalam tapak kasut perempuan di dalam ekshs P5 dan P6. Secara keseluruhan, pembelaan gagal untuk melemparkan apa-apa keraguan munasabah terhadap kes pendakwaan, maka, pendakwaan telah membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 55 & 69–70).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 815–975.

Cases referred to

Ali Hosseinzadeh Bashir v PP (Criminal Appeal No B-05–36 of 2011 (Iran)) (unreported), CA (refd)
Amith Karinja v PP [2016] MLJU 1438, CA (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Fauzi Naim bin Muhamad Zaki v PP (Criminal Appeal No 05–253–11 of 2015) (unreported), FC (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217; [1993] 4 CLJ 201, SC (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Luke Nnaemeka Ugwu v PP (Case No 05–232–10 of 2015) (unreported), FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Reza Mohd Shah bin Ahmad Shah [2002] 4 MLJ 13, HC (refd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
Tobechi Chinonso Madu v PP [2015] MLJU 2038, CA (refd)
Wan Mazuki bin Wan Abdullah v Pendakwa Raya [2010] MLJU 2092, FC (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Criminal Procedure Code ss 399(2)(f), (2)(c), 402B, 402B(2)(b), (6), 422
Dangerous Drugs Act 1952 ss 2, 37(da)(xvi), First Schedule
Evidence Act 1950 s 90A

Ranbir Singh (Ranbir S Sangha & Co Advocates) for the accused.
Hasifulkhair Mohd Jamaluddin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] In this trial the accused faced a charge that reads as follows:

> That you, on the 17th of August 2014, at about 12.15 pm, at the Office of Passengers Examination Unit, Arrival Hall of Kuching International Airport, in the district of Kuching, in the state of Sarawak, trafficked in dangerous drug, weighing a total of 4315.67 grams of Methamphetamine and you thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under Section 39B(2) of the same Act.

PRIMA FACIE CASE

[2] The prosecution called 14 witnesses to testify in its bid to prove a prima facie against the accused. A prima facie case is made out if the prosecution has proved all the essential ingredients of the offence by credible and reliable evidence which has been filtered and sieved through maximum process of evaluation. How prima facie is made out is best illustrated by the Federal Court in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 where it was held as follows:

> ... Put shortly, what the trial court is obliged to do under ss 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? If the answer to that question is in the affirmative, then the defence must be called.

[3] On 13 July 2016, at the end of the prosecution case, I found that a prima facie case has been made out as the prosecution has proven all the essential ingredients of the offence of which the accused was charged with, namely:

(a) the accused had the drug in his possession;

(b) the drug is methamphetamine and listed in the First Schedule of the Dangerous Drugs Act 1952 ('the DDA') and weighed 4315.67g; and

(c) the accused did traffic in the drug. A

[4] For ease of reference, my ruling at the end of the prosecution case is reproduced as follows:

(a) at the conclusion of the case for the prosecution, I am satisfied that the prosecution had proved, prima facie, that the accused had physical possession of the 4315.67g of methamphetamine at the time and place stated in the charge; B

(b) the case for the prosecution revealed that at the material time the accused was seen pushing a trolley with two wheeled luggage black bags (exhs P5 and P6) on it. The accused placed exhs P5 and P6 on the roller of the scanner machine when the monitor displayed a suspicious image; C

(c) upon examination, crystalline substance suspected to be methamphetamine was found inside the brown plastic tape package stashed inside the sole of the women platform shoes in exhs P5 and P6. These exhs P5 and P6 were under the control and custody of the accused. He produced the key to the padlock to enable exh P5 to be opened where large quantity of women platform shoes were found together with the said drugs. In exh P6 too, there were also drugs found in it. This leads to the strong inference that the accused had mens rea possession of the drugs. It calls for explanation from the accused as to how he came to be in possession of the said drugs; D E

(d) as the amount of drug in the present case exceeded 50g of methamphetamine, it would attract the statutory presumption of trafficking under s 37(da)(xvi) of the DDA that the accused shall be presumed, until the contrary is proved, to be trafficking in the said drug; F

(e) the chemist ('PW6') testified that he analysed the crystalline substance and found it to contain 4315.67g of methamphetamine which is a scheduled drug under the First Schedule of s 2 of the DDA; and G

(f) there is no mistaken identity of the subject matter of the charge ie the contents of all the 46 brown plastic tape packages namely the crystalline substances. There is also no break in chain of evidence. The transparent plastic lining inside the brown plastic tape packages (exhs D6(1–46) were accounted for during the seizure and when they were sent to the chemist for analysis. H

THE EVIDENCE AT THE END OF THE PROSECUTION CASE I

[5] The evidence led by the prosecution is that on 17 August 2014, at about 12.15pm, the accused flew in from Kuala Lumpur and arrived at Kuching International Airport. The accused was originally flying from New Delhi to Kuala Lumpur via Malaysian Flight No MH0191 before flying to Kuching

vide Malaysian Flight No MH2504. The accused had intended to return to his home town ie Pontianak. At the arrival hall of the Kuching International Airport, the accused was seen pushing a trolley with two luggage bags on it, the big one being exh P5 and the smaller one being exh P6. It was in these two bags that the drugs were found which were stashed inside the sole of the multiple quantity of women shoes.

[6] Upon seeing the accused pushing the trolley, PW2 (Pauzi bin Bojeng) then instructed the accused to put his two bags on the roller of the scanning machine which was manned by PW3 (Hairul Bahri Ma'riat). Together with PW2 and PW3, there were two other customs officers present at the arrival hall of the Kuching International Airport namely PW4 (Nur Akmal) and PW5 (Mohd Naslan).

[7] After exhs P5 and P6 were scanned, PW4 asked the accused whether the bags were his which he admitted by nodding his head. PW4 then asked the accused to open up exh P5 first which was pad-locked. The accused took out the key to open up exh P5 and found therein were large amount of women shoes. The accused then opened exh P6 and found therein were a few other women shoes together with the accused's clothing. When both the bags were opened, PW4 testified that there was a pungent glue smell coming out from the two bags. PW4 took one of the shoes from exh P5 and scanned it. Both he and PW3 noticed that there was a suspicious image on the screen of the scanning machine. He took the same shoe and scanned it for the second time which showed the same result. This second scanning was witnessed by PW3, PW4 and PW5.

[8] Having found something suspicious in the two luggage bags exhs P5 and P6, the accused was then directed to go to the office of Passengers Examination Unit, Kuching International Airport with his belonging. At this office, PW5 opened up one of the shoes inside exh P6 and found a brown tape package inside the sole of the shoe. The same glue smell was coming from the shoe. Upon this discovery, PW5 then called up PW11 (Gerry Ho) from the Narcotics Unit of the Customs Department.

[9] When PW11 and his team of customs officers arrived at the scene, he was briefed by PW5 regarding the discovery of the suspicious drug. The accused and the exhibits were handed to him for his further direction. In front of the accused, PW11 conducted a preliminary test on the crystalline substance inside the brown tape package found by PW5 and the result was positive for methamphetamine. Based on this finding, PW11 arrested the accused and lodged a police report on the arrest. The accused and all his belongings were later brought to the Customs Office at Jalan Gedong.

[10] At the Customs Office, PW11 conducted the search on all the bags of the accused including the plastic bag and paper bag (exhs P5, P6, P8 and P9). The list of items found during the search were recorded in exh P43 and this was done in front of the accused and signed by him. A total of 46 brown tape packages were found hidden inside the multiple number of women shoes (total of 43 shoes) found inside exhs P5 and P6. The brown tape packages were marked individually by PW11. The photographs of these brown tape packages can be seen in exhs P2(33–45) and in exhs P3(53–172).

[11] The exhibits together with the accused were handed over by PW11 to the investigating officer PW14 (Olivia ak Alim) at about 9.05pm on the same day ie 17 August 2014 and the handing over is reflected in exh P62. Upon receipt of all the exhibits, PW14 initialled them one by one according to the search list exh P43 and the photographs of the exhibits can be seen in exhs P3(1–155).

[12] The brown tape packages were put into plastic bags and each plastic bag was then put inside individual envelope labelled as 'L1'–'L43' by PW14. These can be seen in exhs P3(156–209). These envelopes were later put inside a brown box and wrapped with a brown paper marked 'L' and sealed with customs security seal by PW14 (exh P23). Exhibit P23 was kept in PW14's locked cabinet inside her office until it was sent to Chemistry Department for analysis on the 20 August 2014. Exhibit P23 was acknowledged receipt by a chemist PW6 (Mohd Riduan bin Bakhir) as can be seen in exh P21. After the analysis was completed, PW6 returned the box (exh P23) with the Chemistry Department security seals to PW14 together with the chemist report exh P24.

THE ACCUSED HAD THE DRUG IN HIS POSSESSION

[13] It is trite law that prosecution must establish that the accused had possession and knowledge of the dangerous drugs to bring home the charge under s 39B of the DDA. The meaning of 'possession' in the context of the DDA is explained in the case of *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 where Taylor J at p 31 had this to say as follows:

> The words 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge, there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides by the presumption that if a man has a custody or control of a drug, the onus of proving, first that he did not have possession and secondly that he did not know the nature of the drug, shall be shifted to him.

[14] The word 'possession' was further elaborated in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 at p 239, where Thomson J held:

> 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest*

A (9th Ed, p 304) ... A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need ... Intention is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case ...

[15] In *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13, the High Court explained proving possession as having to show that the accused had custody or control of the dangerous drugs and that he had the required knowledge of the thing possessed. Custody or control can be proved by direct evidence or by drawing inferences from proved facts. With regard knowledge, the court is not concerned with the knowledge of a reasonable man but reasonable inference of knowledge to be drawn from a situation.

[16] In *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 at p 367, Lord Reid speaking for the majority in the House of Lords stated that it would be pedantic to hold it must be shown that the accused knew precisely which drug he had in his possession, rather, it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession.

[17] In our present case, it is my view that there was direct evidence of the accused's physical control and custody of exhs P5 and P6 and its contents ie 46 brown tape packages hidden inside the sole of women shoes containing crystalline substances. This followed from the evidence of PW2 who said that the accused was pushing the trolley with the luggage bags exhs P5 and P6 on it, when he arrived at the arrival hall of the Kuching International Airport. Upon instructed by PW2 to put his bags on the scanning machine, he fully cooperated and put them on the roller of the scanning machine. When the bags were scanned the images of the suspected drugs were shown from the screen of the scanning machine. By having the two luggage bags exhs P5 and P6 with him, carrying it and putting it on the scanner machine, the accused had taken physical custody and control of it and its contents.

[18] After exhs P5 and P6 were scanned, PW4 asked the accused if the said luggage bags were his, the accused nodded his head. PW4 then asked the accused to carry his luggage bags to the security counter. When PW4 asked the accused to open up exh P5 which was pad-locked, the accused was seen rummaging his jean's pocket to look for the key but later found the key inside the paper bag (exh P9) which too was hand carried by the accused together with the two luggage bags. Once exh P5 was opened, PW4 could smell a pungent glue smell and he saw a lot of women shoes. PW4 also asked the accused to

open exh P6 to see its content. In exh P6, PW4 saw a few women shoes and he could also smell the same pungent glue smell.

[19] At this juncture, I would say, if the luggage bags exhs P5 and P6 were not his or they had been mistakenly taken by him, he would have stated his mind to the customs officers but he did not. The accused took out the key to exh P5 without much hassle when he was instructed to open it where a lot of women shoes containing drugs were found in it. The accused being in possession of exhs P5 and P6 is further proved by the luggage tags (exhs P12 and P14) and the luggage claim tickets (exhs P20(A) and (B)) with the accused's name stated on them.

[20] The cumulative evidence of PW2, PW3, PW4 and PW5 was sufficient to prove prima facie that the accused had physical control and custody of exhs P5 and P6 from the point of time when he pushed the trolley with the luggage bags on it until they were scanned and opened with the key provided by the accused. PW4 took out one of the shoes from exh P5 and scanned it. The scanned image of the shoe shows suspicious images on the screen of the scanning machine. The same shoe was scanned for the second time and the same result was shown on the screen in the view of PW3, PW4 and PW5.

[21] The accused's knowledge of the contents of exhs P5 and P6 could be inferred from the facts and the circumstances of this case. In the present case, the drugs were carefully concealed inside the sole of women shoes which may indicate the intention to avoid detection by the authority and thereby point to the accused's knowledge. By saying so, I find support from the Court of Appeal's case of *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764 where it was held that the manner or the method employed to convey or transport the drugs may sometimes furnish evidence of knowledge. The accused's knowledge of the contents of exhs P5 and P6 could also be inferred from his conduct when he shed tears after being shown the results of the test kit done to the first brown tape package as testified by PW5 and PW11.

[22] Furthermore, the contents of exh P6 point to the accused as the impugned drugs were found in it together with his clothing. The DNA analysis on the clothes in exh P6 confirmed that it contained the DNA of the accused as stated in the chemist report (exh P30) prepared by PW7 (Phoon Yoong Keat).

[23] There is no denying that the accused in our present case had physical control and custody of exhs P5 and P6 he carried on the trolley which he pushed with both hands to the scanning machine. Based on the credible evidence adduced by the prosecution of the accused's physical control and custody of exhs P5 and P6 and knowledge of its contents which is to be inferred

from the circumstances and facts of this case, I found and held that the prosecution had sufficiently proved that the accused was in possession of exhs P5 and P6 and the drugs which were contained in it. It was up to the accused to give a plausible explanation of his possession.

THE DRUG IS METHAMPHETAMINE AND LISTED IN THE FIRST SCHEDULE OF THE DANGEROUS DRUGS ACT 1952 AND WEIGHED 4315.67 GRAMS

[24] The chemist, PW6 (Mohd Riduan bin Md Bakhir) testified that he received a package marked 'L' which later marked as exh P23 from PW14 and inside it he found 43 brown envelopes labelled as 'L1'–'L43'. For envelope 'L1'–'L3', each contained a transparent plastic bag with two brown tape packages inside it whilst for envelopes 'L4'–'L43', each contained a transparent plastic bag with a brown tape package inside it. In total there were 46 brown tape packages. Upon his analysis he found that the material in the 46 brown tape packages in 'L1'–'L43' contained a total of 4315.67g of methamphetamine. PW6 prepared his chemist report which was tendered and marked as exh P24.

[25] In his submission, learned counsel pointed out the difference in the net weight of the crystalline substance of the 46 brown tape packages mentioned in exh P24 and PW6's witness statement ('WSPW6'). In exh P24, the net weight of the crystalline substance is stated as 5674.96g. In WSPW6, the nett weight of the crystalline substance in each package as stated on pp 2–3 of WSPW6 amounts to 5674.71 (by adding up all the net weight of each package). The difference in the net weight between exh P24 and WSPW6 is 0.25g. Learned counsel took up this point on the difference in the net weight as an indicator that the crystalline substance had been tampered with. This is because the net weight of the crystalline substance in both exh P24 and WSPW6 should be identical as the subject matter is one of the same.

[26] PW6 in his evidence defined 'gross weight' to mean the brown tape package containing the crystalline substance (at p 177 of the notes of proceedings) and the 'net weight' is the difference weight between the gross weight and the empty package (at p 4 WSPW6). No doubt, there is the difference in the net weight of the crystalline substance in exh P24 and WSPW6 but PW6 had given his explanation why the net weight in both are stated in that manner. PW6 testified that he used 4 decimal points weighing calculation in the laboratory but when he reduced it into exh P24 he used the two decimal points system. He also used the two decimal points system in WSPW6 when he recorded the details of the net weight for each brown package individually (pp 181–182 of the notes of proceedings).

[27] Now, despite this differences, the net weight of the methamphetamine is the same in both exh P24 and WSPW6 which is 4315.67g. This is the amount of the weight of the methamphetamine for which the accused is charged with. In his chemist report exh P24, PW6 clearly differentiate the net weight of the crystalline substance in all the brown tape packages and the weight of the methamphetamine after the analysis process in the following words:

> Kesemua bungkusan plastik mengandungi sejumlah 5674.96 gram (berat bersih) bahan Kristal jernih. Setelah dianalisis saya mendapati bahan tersebut mengandungi 4315.67 gram methamphetamine.

[28] Learned counsel during the trial never took up the issue of the net weight of the methamphetamine weighing at 4315.67g which is the subject matter of the charge. The defence had not been prejudiced at all because the nett weight of the methamphetamine remains the same throughout PW6's chemist report exh P24 and his witness statement WSPW6. There could not be any mistaken of identity of the drugs analysed by PW6.

[29] In his WSPW6, PW6 testified that he received exh P23 and its contents, namely, 43 brown envelopes labelled as 'L1'–'L43' which contained 46 brown tape packages from PW14 on 20 August 2014 (acknowledge receipt of the exhibits can be seen in exh P21). PW6 said he removed the contents of the brown tape packages and blended it to make it homogenised. He then subjected the crystalline substances to the 'marquis test' and 'simon test' which are colour tests to detect the presence of methamphetamine. He then ran the confirmation analysis test by gas chromatography-mass spectrometer ('GCMS') and confirmed that a homogeneous powder from each brown tape package contains methamphetamine. At this stage, all the homogeneous powder in brown tape packages were mixed together and homogenised again. Next is a quantitative test using gas chromatography — flame ionisation detector ('GC-FID') to determine the weight of the methamphetamine. For this test, he took 21 representative samples of the homogenous powder and upon analysis he found that the materials in the brown tape packages contained a total of 4315.67g of methamphetamine. PW6 said he was satisfied with the results of the tests he had performed that the contents of the methamphetamine that he obtained is the methamphetamine for the entire contents of the materials. After the process completed, PW6 packed the remaining balance of the materials and put it in a separate plastic packet supplied by him with Laboratories No 14-FR-Q-0328. This plastic packet and all the other exhibits in the original package marked 'L' together with the chemist report P24 dated 1 October 2014 were given back to PW14.

[30] From the evidence outlined above, I am satisfied that the prosecution had sufficiently proved to the required standard that the crystalline substances

found in the 46 brown tapes packages all found in the 43 brown envelopes marked 'L1'–'L43' in a package marked 'L' (exh P 23), contained a total of 4315.67g of methamphetamine. Finally, PW6 stated in his chemist report exh P24 that methamphetamine is a drug listed in the First Schedule of the DDA. Thus, the prosecution had proved the second ingredient of the offence.

[31] Under the same heading, learned counsel raised the issue that PW6 was not properly *gazetted* because there was no notification by the Minister under s 399(2)(f) of the Criminal Procedure Code. Learned counsel produced three *gazettes* which were marked as exhs D1, D2 and D3 and in all these none of it showing the name and designation of the person whom by notification had the name of PW6 published in the *gazette*. In other words, although the name of PW6 appeared in the *gazettes* as a chemist, there is no name and designation of the person to authorise such *gazetting*. That being the case, learned counsel submitted that PW6's evidence is inadmissible.

[32] With due respect, I cannot agree with learned counsel. The fact that PW6 is a chemist employed by the Chemistry Department Malaysia is undisputable and based on s 399(2)(c) of the Criminal Procedure Code, it is clearly stated that the report of the government's chemist may be given in evidence. Section 399(2)(f) of the Criminal Procedure Code refers to any category or class of persons other than the chemist. In my view, PW6 who possessed the necessary skill as proven by his academic qualification and experience was competent to give expert evidence in this case and the court is entitled to accept his expert opinion on its face value unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict PW6's evidence (*Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; [1993] 4 CLJ 201).

THE ACCUSED DID TRAFFIC IN THE DRUG

[33] The last ingredient that the prosecution needs to prove is that the accused did traffic in the drug. The prosecution relied on the presumption of trafficking under s 37(da)(xvi) of the DDA that any person found to be in possession of 50g or more in weight of methamphetamine shall be presumed, until the contrary is proved, to be trafficking in the said drug. It had been proven that the nett weight of methamphetamine found inside exhs P5 and P6 that were carried by the accused is 4315.67g, which is in great excess than the threshold set at 50g, the accused must be presumed to be trafficking under s 37(da)(xvi) of the DDA. The above ingredient is therefore proven.

SECTION 2 OF THE DDA

[34] Apart from proving all the three ingredients, the prosecution had proven to this court that the act of the accused in carrying exhs P5 and P6 from India to Kuala Lumpur then Kuching falls within the meaning of 'trafficking' under s 2 of the DDA.

SOME OTHER ISSUES RAISED BY LEARNED COUNSEL AT THE END OF THE PROSECUTION CASE

The photographs

[35] Learned counsel for the accused submitted that the photographs tendered by the prosecution and marked as exhs P2(1–172) and exhs P3(1–261) respectively should be disregarded by the court on the grounds that: the duplicate memory card from which the photographs in exhs P2 and P3 were printed was never tendered in court; not all the photographs were copied on to the duplicate memory card; the duplicate memory copy was sent to the shop to print out its contents; the photographer PW1 (Stephen ak Pina) was not present at the shop during the process of uploading and printing; and, the person in the shop who did the printing was not called as witness. As the photographs were printed out from the computer, the prosecution is required to tender a certificate pursuant to s 90A of the Evidence Act 1950 but there was no such certificate tendered which makes all the images in the photographs unreliable.

[36] It should be noted that despite all these grounds put forth by the defence, at no point in time that learned counsel object to the tendering and marking of the photographs as exhibits during the trial. The defence never raised the issue that the photographs printed out from the duplicate memory card were not the same with the photographs contained in the original copy of the memory card. The original copy of the memory card was tendered by the prosecution and marked as exh P4. The prosecution submitted that although not all the photographs were copied on to the duplicate copy of the memory card and printed out by the shop, all the photographs that were tendered in court can be found in the original memory card exh P4. If the objection was raised during the trial, the prosecution at the very least could have made the efforts to show the contents of exh P4 and compare them with the printed photographs. Furthermore, PW1 had identified the photographs tendered and confirmed that all these photographs were saved in the original memory card exh P4. In any event, it is my view that the reference to the photographs and images in exhs P2 and P3 were merely to assist the court and although they

were not produced, the prosecution case would not be jeopardised.

Crystalline substance or crystal powder

[37] Learned counsel also raised the issue that the terms used by the learned DPP in his opening statement namely 'crystal powder' to describe the contents found in the brown tape package is inconsistent with the terms used by PW6 and PW11 namely 'crystalline substance' to refer to the same during the trial. He argued that these two different terms may not refer to the same subject matter which is the contents of the brown tape package but other material instead. On this point, I wish to refer to the Federal Court's case of *Wan Mazuki bin Wan Abdullah v Pendakwa Raya* [2010] MLJU 2092 cited by the learned DPP in which case it was held that there was nothing to stop the prosecution to give fresh evidence or clarifying evidence other than what is stated in the opening statement. In that case, Richard Malanjum CJ (Sabah and Sarawak) stated:

> [31] The contents of the opening statement of the learned deputy should not be taken as conclusive so as to disallow any further evidence to be adduced irrespective of it being fresh or consequential. We would further say that an opening statement in any trial should be taken as merely a guide to the court and the parties before it of the evidence likely to be adduced in order to prove or rebut a charge, claim or defence thereof. Indeed, an opening statement should not be allowed to lock out any fresh or clarifying evidence which may be relevant and necessary in the interest of justice.

Transparent plastic found inside the brown tape package which contained crystalline substance

[38] Learned counsel further raised an issue relating to the presence of a transparent plastic lining inside the brown tape packages which according to him was stated by PW6 in his chemist report exh P24. PW6 however, never stated in his witness statement and oral testimony that the brown tape package contained another plastic packet within it. Neither PW11 nor PW14 ever mentioned in their evidence regarding the existence of a transparent plastic lining inside each of the brown tape packages but there was one thing for sure that these witnesses PW11 and PW14 had testified that the contents of the brown tape packages looked like crystalline substance which was confirmed by PW6 when he analysed it.

[39] PW6 stated in his chemist report exh P24, as follows:

> Setiap satu sampul surat mengandungi satu (1) plastic lutsinar yang berisi bungkusan plastik yang dibalut dengan tape plastic yang berwarna coklat.

Learned counsel translated the above into English which reads:

Each envelope contains 1 transparent plastic which containing a plastic package wrapped with a brown plastic tape.

[40] Learned counsel submitted that since both PW11 and PW14 did not indicate that there was a transparent plastic lining inside the brown tape packages and PW6 never identified the plastic packet lining inside the brown tape packages as he stated in exh P24, there was a break in chain of evidence which shows that the exhibits were either mixed up or more likely to be tampered with. PW14 was then shown the brown tape packages in court which had been marked as exhs P23(1)(ii)–P23(43)(ii) and she agreed that inside each of the brown tape packages, there was a translucent white plastic attached to it. These transparent plastics lining in each of the brown plastic tape packages were marked as exhs D6(1–46).

[41] On this point it is important to examine the search list (exh 43) prepared by PW11 during the search conducted in front of the accused. It is also important to look at the list of exhibits prepared by PW14 (exh P22) when she sent these exhibits to PW6 for analysis. It is equally important to examine the chemist report (exh P24) and PW6's witness statement (WSPW6) as regards to the exhibits which he received from PW14.

Exhibit 43 (search list)

[42] For example, on the finding of one of the brown tape packages in the sole of the shoe, it was described by PW11 in the search list exh P43, *lampiran* 1, item No 21, rows 2 and 3 as follows:

Kasut tumit tinggi sebelah kiri berwarna merah berjenama 'Her Party collection' yang berisi satu bungkusan yang digolong dengan tap plastic berwarna coklat (row 2 of item 21, Lampiran 1, exh P43).

The above item 'ditanda' at column 4 of *lampiran 1* as A20(1):

Bungkusan yang mengandungi kristal jernih berbalut plastik lutsinar yang digolong dengan tap plastik coklat (row 3 of item 21, Lampiran 1, exh P 43).

The above item 'ditanda' at column 4 of *lampiran* 1 as A20(1)(a).

Exhibit P22 (list of exhibits prepared by PW14)

[43] The exhibits were handed over to PW14 by PW11 and each of the brown tape packages were marked accordingly. These brown tape packages were put in 43 envelopes marked as 'L1'–'L43'. In envelopes 'L1'–'L3', there were two brown tape packages in each envelope. In envelopes 'L4'–'L43', there was one brown tape package in each envelope. All together there were 46 brown tape packages.

[44] Now, for the item 'ditanda' as A20(1)(a) at column 4 of item 21, *lampiran* 1, exh P43, this is recorded as such in envelope 'L1' in the list of the exhibits (exh P22) prepared by PW14 before the exhibits were sent to PW6 for analysis. The contents of envelope 'L1' described by PW14 in exh P22 as '1 bungkusan plastik lutsinar yang mengandungi 2 plastik lutsinar yang digolong dengan tap plastic berwarna coklat masing-masing bertanda A20(1)(a) dan A20(2)(b) dan berisi Kristal jernih'.

PW6's witness statement (WSPW6) and chemist report (exh P24)

[45] In both PW6's witness statement (WSPW6) and his chemist report (exh P24), PW6 had indicated that he received the same exhibits from PW14 namely, 43 brown envelopes labelled as 'L1'–'L43' which contained 46 brown tape packages. In his chemist report exh P24, he described the contents of each of the envelopes as follows:

> Setiap satu sampul surat mengandungi satu (1) plastic lutsinar yang berisi bungkusan plastik yang dibalut dengan tape plastic yang berwarna coklat.

He went on to describe the contents of the enveloped levelled 'L1'–'L3' in his chemist report exh P24, as follows:

> Untuk sampul surat 'L1' hingga 'L3', masing-masing mengandungi dua (2) bungkusan plastik yang dibalut dengan tape plastik berwarna coklat.

[46] In his witness statement WSPW6, he put up a table to show the details of what he found inside each envelope (at pp 2–3 of WSPW6). For instance in envelope 'L1' he found two packages wrapped with brown tape marked with A20(1)(a) and A20(2)(b).

[47] Based on the physical exhibits produced in court and the documentary exhibits which show the handling of the same exhibits, the court then marked them accordingly. For instance, the contents of envelope 'L1' is marked by the court as follows:

Exhibit No	Description
Exh P23(1)	Envelope L1
Exh P23(1)(i)	Transparent plastic bag found inside envelope 'L1'
Exh P23(1)(ii)	Package wrapped with brown tape marked A20(1)(a)
Exh P23(1)(iii)	Package wrapped with brown tape marked A20(2)(b)

[48] The marking of the exhibits in exh P43, exh P22 and exh P24 and WSPW6 are all consistent and they were accounted for by PW6, PW11 and

PW14. The defence did not at all challenge the identity of the exhibits during the search until the time when they were sent to the chemist for analysis. In my view what is material here is the contents of the brown tape packages namely the crystalline substances which were found to contain methamphetamine upon analysis and it is for this findings that the accused in the present case was charged with. I therefore find that the exhibits ie the 46 brown tape packages were properly handled by the customs officers and there were no break in the chain of evidence. They were the same exhibits seized from the accused. The existence of the transparent plastic lining inside the brown tape packages suggested by the defence was not disputed and admitted by the prosecution and this is reflected in the photograph exh P2(56). The presence of this transparent plastic lining inside the brown tape packages is not highlighted because what really matters for the prosecution is the crystalline substances itself contained in the said brown tape packages.

[49] Having found that a prima facie case has been made out, I call upon the accused to enter his defence. The accused is the only witness called in defence and he elected to give sworn evidence.

THE DEFENCE CASE

[50] The accused defence is basically of having no knowledge of the contents of exhs P5 and P6 when he was asked to carry them by a couple, Frankie and Sani. His defence is premised on these facts. He was invited to attend Frankie and Sani's wedding in India. Upon his return to Pontianak via Kuching he was requested to bring the women shoes inside exhs P5 and P6 as wedding gifts for Frankie and Sani's friends and relatives in Pontianak. He agreed to the request as he did not suspect of anything amiss until he was caught to carry the drugs at Kuching International Airport when he admitted that he was set up and trapped by Frankie and Sani to do what he did.

[51] The accused said he and his wife were invited to attend the wedding of his wife's friend named Sani in India. This Sani and his wife's were work colleague when they were working in Jakarta in the past years before his marriage to his wife. Since there was only one return air ticket to India provided by the couple Frankie and Sani, the accused decided to go to India by himself without his wife. I am perplexed by this reasoning because in my opinion, no reasonable man would have attended the wedding of someone who is totally a stranger to him and staying thousand miles away overseas. Furthermore, Sani was only a friend of his wife and not even her best friend. The accused also gave inconsistent evidence as to how the air ticket to India was purchased. At first during re-examination, he said he printed out the air ticket from an email allegedly sent by the couple. In cross-examination, he said the travel arrangement to India was made verbally, not in writing. In re-examination, he

said the travel agent issued him with the print out ticket. He also said that the air ticket was paid by Frankie and Sani through bank transfer without giving further evidence to support his story. No paper trails record, email communications, receipts or document from the bank and the travel agent were tendered in respect of this travel arrangement to India.

[52] It was the accused's own defence that he had never been to India and this trip was his first. He also said that he never met the couple and he was supposed to stay with them during his stay in India. He also said that he was facing a language barrier which caused him difficulty in communicating with the Indian people. That being the case, I am wondering how it was possible for the accused to have met with Frankie and Sani on his arrival at New Delhi airport for the first time. There was a missing link in the accused's story that there was no explanation to show how he managed to identify the couple at New Delhi airport despite all the problem faced by him as mentioned above.

[53] The accused said that he was brought by the couple from the New Delhi airport to his hotel. He was introduced to someone by the name Dev who acted as his tourist guide. The couple brought him for a sightseeing and in preparation for their wedding the accused accompanied them to a bridal shop. On the wedding day, the accused went to the couple's house which was the actual purpose why he went to India. Now, if the accused's story was believable that the wedding of the couple had taken place, he should be able to prove it by showing the wedding photographs of the couple but there was none. The explanation given by the accused was that he was told by the couple not to take the photographs as they had a better camera than the accused's camera. Such explanation, in my view is misconceived and seemed to be illogical. This is because this wedding is so meaningful and a memorable occasion for which he was invited, surely he would want to take and keep the photographs of the couple to show it to his wife back home of her friend's wedding regardless of whether he has a good camera or not. He could even take the photographs of the couple not only during the wedding but on other occasions from his handphone but he did not. Without the wedding photographs, it is difficult to believe such occasion did take place at all.

[54] The accused also said in his defence that he was sent off to the New Delhi Airport by the couple in their car for his return trip. He said he brought along his bag exh P6 containing his clothes and personal items. In the car on the way to the New Delhi Airport, he was seated on the front passenger seat while Sani was seated on the back passenger seat while Frankie was on the driver's seat. Somewhere near the airport, Frankie told him to bring another bag exh P5 containing multiple quantity of women shoes purportedly as gifts to the couple's friends and relatives in Pontianak. At the same time, few other shoes were also put by Sani into exh P6. The accused said he wanted to hand

carry that few other shoes but the couple insisted for it to be put in exh P5. As a token for his willingness to bring the women shoes inside exh P5 and few other women shoes inside exh P6, he was given a pair of branded 'Gucci' shoes which he also carried with him in a shoebox.

[55] Learned counsel for the accused argued that the accused was an innocent carrier as he was put in a situation where he could not have rejected the request to carry exhs P5 and P6 while they were in the car on the way to the New Delhi Airport. The couple had also kindly given him a pair of 'Gucci' shoes which made the accused felt obliged to accede to their request to show his appreciation of the gift given to him. In my view, this explanation is also not plausible and incredibly unbelievable. The last minute request to carry exh P5 which contained a multiple number of women shoes and the other few women shoes which were put by Sani in exh P6 on their way to the airport should have raised some suspicions in his mind that he ought to have checked its contents. Although he might not have possibly checked the contents of the bags in the car but at least he could do that at the airport before his departure. The accused said on arrival at the New Delhi Airport, the couple dropped him off with the bags and he proceeded to the check-in counter to check in his bags. According to him he had one hour at the airport before the departure time. It only takes at least a few minutes for the accused to have a look at the contents of exhs P5 and P6 to satisfy himself of what he was carrying. Had he done so, he could have noticed the unusual volume of shoes not exactly in pairs scattered inside exh P5 and it could have also triggered in his mind why only a few of women shoes were put in his bag exh P6 in that manner purportedly as gifts. Neither was there any plausible explanation given as to why exh P5 was securely locked with a padlock and the key to it was kept by him. Once control and custody has been established and in the absence of any plausible explanation, it is a fair inference that accused had knowledge of the drug found in the sole of women shoes inside exhs P5 and P6.

[56] I also find it a rather strange that the purported recipients of the wedding gifts who were the couple's friends and relatives were not identified and ascertained despite the large amount of women shoes found in exhs P5 and P6. Further, the purported wedding gifts do not like a proper gifts as they were not wrapped or placed inside the shoebox which is quite usual for brand new shoes. These types of ladies shoes as admitted by the accused can be easily found and much cheaper in Pontianak. That makes the accused's story regarding the gifts looked like an afterthought.

[57] The defence further argued that the fact that the accused was crying when he was informed for the first time that he was carrying drugs by the customs officers at the Kuching International Airport was an indication that he was innocent for it was not easy for someone to shed tears instantaneously. The

defence also made a point that if the accused had knowledge of the dangerous drugs in the shoes which were in the hidden compartment of the suit cases, he would have avoided PW2 instead of walking directly towards him. PW2 did not observe any odd or suspicious behaviour from the accused such as nervousness. Instead the accused obeyed PW2's instructions without hesitation and he lifted the two bags himself and put them on the rollers of the scanning machine for them to be scanned. Learned counsel for the accused also submitted that the conduct of the accused who kept on asking what was the contents found inside the women shoes shows that he had no knowledge of the drugs.

[58] I disagree with the above arguments. When someone is crying, it is a human reaction to certain situations and it could also be an expression to show one's guilty mind. It is normal for the accused not to make attempt to run in that situation in front of the customs officers because if he did, that would only point to one thing that he knew of the offending drugs he was carrying while his bags were scanned. At this juncture, I wish to refer the Court of Appeal's case of *Amith Karinja v Public Prosecutor* [2016] MLJU 1438, where the court held that the fact that the accused did not look panic or scared when the scan was done and the accused did not run away before, during and after the scan which was quite similar to our present case cannot be used to support his defence of having no knowledge of the drug. The Court of Appeal further held that they are at best neutral evidence which neither support nor demolish the defence.

[59] The accused's caution statements (exhs D4 and D5) were taken the next day on 18 August 2014 at 2.45pm and 4pm respectively after he was caught and arrested on the 17 August 2014. It was submitted by learned counsel that the accused had no time to concoct the version of events that he gave and as such the cautioned statements should be held to be credible. In his caution statements, he revealed the names of two characters ie Frankie and Sani. The full name and complete address of Frankie and Sani were not given by the accused in his cautioned statement neither the details were given to the investigating officer PW14 except for Frankie's handphone's number which was found in the accused's blackberry handphone. It is my view that if the accused wished this court to believe his story that there were such characters, he is duty bound to call his witnesses including his own wife Mona Fitri to disprove knowledge of the drugs and the truth of the wedding invitation.

[60] According to learned counsel, the existence of the name 'Frank N' in the caller list in the accused's handphone, corroborates the fact that the two named characters mentioned in the cautioned statements do exist. This was confirmed by PW14 who said that the number used by the caller ID Frank was an international phone number. It must be noted that the name 'Frankie' was

stated by the accused in his cautioned statement and in his oral evidence, he mentioned the character's name as 'Frank'. In the caller list in the accused's handphone the name stated as 'Frank N'. Be that as it may, it was the prosecution's case that no investigation was made into Frank's phone number as there was no details given by the accused. PW14 also stated that there was no SMS from the caller ID Frank to assist them in the investigation. On this point, I refer to the case cited by the learned DPP is his submission ie the Court of Appeal's case of *Tobechi Chinonso Madu v Public Prosecutor* [2015] MLJU 2038 and it was held that:

> [16] The mere fact that Ossy's name was mentioned during the police investigation is not evidence that Ossy actually exists. How were the police to investigate the existence of this person when the appellant did not even give his full name and his address? The poor investigating officer may end up chasing a wild goose. We therefore found no merit in the appellant's argument that the police's failure to investigate the existence of Ossy must be held against the prosecution.
>
> [17] In any event, since the appellant had a legal burden to discharge (to disprove knowledge) it was his duty to call Ossy to give evidence and not for the police to investigate if it was true that Ossy had asked him to carry the soap boxes: *Baharom v Public Prosecutor* [1960] MLJ 429; [1960] 1 LNS 9; *Liew Siew & Anor v Public Prosecutor* [1969] 1 LNS 90; *Chu Tak Fai v Public Prosecutor* [1998] 4 CLJ 789. Hence, since Ossy was not called to give evidence there was no way the court could verify the truth of what Ossy told him at Lagos Airport. In fact the evidence is hearsay and inadmissible as the object was to prove the truth of what Ossy told him: *Public Prosecutor v Subramaniam* [1956] MLJ 220 (PC).

[61] It was also the prosecution's case that even if Frankie and Sani were actually exist, it would not exonerate the accused who was caught with the two bags exhs P5 and P6 containing the drugs. The prosecution cited the case of *Ali Hosseinzadeh Bashir v Public Prosecutor* (Criminal Appeal No B-05–36 of 2011 (Iran)) Abdul Rahman Sebli JCA said this:

> [27] Even assuming it is true that Ashgar does exist and that he did ask the appellant to carry the bag to Malaysia, the question for the trial court to consider was whether the accused had knowledge of the drugs. To prove trafficking, knowledge must of course be established but that is a matter for the appellant to disprove by virtue of section 37(d) of the DDA and not for the prosecution to establish at the close of its case once custody or control had been established. Thus, whether he was asked by someone to carry the bag is irrelevant in any event.
>
> [28] Further, if in fact the appellant had knowledge of the drugs, the fact that he was asked by Ashgar to carry the drug, even if true, will not exonerate him of the offence charged unless he can bring himself within the protection accorded by section 94 of the Penal Code ...

[62] Based on the above authorities, in my view, what is important is that the drug was in the control and custody of the accused and his knowledge of the said drugs found in exhs P5 and P6 can be inferred from the facts of the case.

So, even if 'Frankie and Sani' do exist, it will not exonerate the accused of the offence for which he was charged with.

NON-COMPLIANCE OF S 402B OF THE CRIMINAL PROCEDURE CODE ('THE CPC')

[63] Just before the ruling of no case to answer on the 13 July 2016, the learned DPP requested this court to make an order for the witnesses statements which were tendered and marked as part of the evidence of the prosecution be taken as read if they were not read aloud pursuant to the recent decision of the Federal Court on this point in *Luke Nnaemeka Ugwu v Public Prosecutor* (Case No 05–232–10 of 2015). The learned DPP informed this court that there was no grounds of decision released as yet and until the writing of this judgment, the position remains the same that the full grounds of decision is still not available. Both the learned DPP and learned counsel for the accused did not make any submission on this procedural issue under s 402B(6) of the Criminal Procedure Code ('the CPC') in their submissions of no case to answer.

[64] The trial by witness statement was mutually agreed by both the DPP and learned counsel for PW2, PW3, PW4, PW5, PW6, PW8, PW9, PW10, PW11 and PW14. The learned DPP had conducted his preliminary inquiries on his witnesses before the marking of their witness statement by the court. The first witness who used the witness statement is PW2 who was asked whether he would like to adopt his witness statement as part of his oral evidence to which he agreed. The DPP then requested the witness statement be tendered and marked as exhibit and its contents be taken as read if the defence had no objection. Learned counsel had no objection to this request. The court then marked PW2's witness statement as WSPW2 as well as ordered the said witness statement to be taken as read.

[65] The relevant part of the notes of proceedings in respect of PW2's evidence on the use of his witness statement as part of his evidence for the trial of this case is reproduced as follows:

> Examination-in-chief of PW2 by DPP Hasifulkhair:
>
> Q: Can you check and verify that this is your Witness Statement?
>
> A: Yes, I confirm.
>
> Q: Can you sign at the end of your Witness Statement?
>
> A: (PW2 signed his Witness Statement).
>
> Q: Do you adopt this Witness Statement as part of your Examination In Chief?
>
> A: Yes.
>
> DPP Hasifulkhair: I wish to mark the Witness Statement.
>
> Court: Witness Statement of PW2 marked as WS-PW2.

DPP Hasifulkhair: If there is no objection from my learned friend, may I have the Witness Statement to be taken as read.

Mr Ranbir: No objection.

Court: Witness Statement of PW2 is taken as read.

[66] The main complaint by learned counsel for the defence is that the witness statement of all the prosecution's witnesses did not contain a declaration under s 402B(2)(b) of the CPC and it was not read out aloud in court and neither did the court dispense with the reading of it out aloud in respect of PW4, PW9, PW10, PW11 and PW14 pursuant to s 402B(6) of the CPC.

[67] In my view the non-compliance of s 402B of the CPC does not in any way prejudiced the accused as it was not a matter of concern especially on the part of the defence in the first place but it was played up in the defence submission at the end of the defence case.

[68] The learned DPP then referred this court to the Federal Court's case of *Fauzi Naim bin Muhamad Zaki v Public Prosecutor* (Criminal Appeal No 05–253–11 of 2015) and like the case of *Luke Nnaemeka Ugwu* the grounds of decision has not been released out at the time of the writing of this judgment. According to the learned DPP, in *Fauzi Naim*'s case it was held that the conditions as stipulated in s 402B are directory and not mandatory. That being the case, in my view, the irregularity of non-compliance can be cured under s 422 of the CPC. Furthermore, I find that there is no substantial miscarriage of justice which had occurred since the prosecution had conducted some preliminary inquiries to the satisfaction of the court before the witness statement was produced and tendered.

CONCLUSION

[69] Based on the above reasons, I find that the defence had failed to cast a reasonable doubt on the prosecution case that the accused had actual possession of the drug. The defence also had failed to rebut the presumption of trafficking under s 37(da)(xvi) of the DDA on the balance of probabilities. Further, the act of ferrying the drugs in exhs P5 and P6 by the accused falls within the definition of trafficking under s 2 of the DDA although the actual purpose of carrying the drugs was not achieved.

CONVICTION AND SENTENCE

[70] Having regard to the totality of all the evidence at the conclusion of the whole trial, I am satisfied that the prosecution had proven its case against the accused beyond reasonable doubt. Accordingly I find the accused guilty of the

charge of trafficking and convict him on it. The accused is sentenced to the only punishment mandated by the law, and that is, to be hanged by the neck till he is dead. All exhibits except the documentary ones are to be returned to the prosecution for safe keeping until the disposal of any appeal.

Accused convicted of the offence and sentenced to death.

Reported by Dzulqarnain Ab Fatar